
IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Harvey Monson, Plaintiff and Appellant

v.

Tim Dwyer, Exeter Exploration Company, and Inter-American Petroleum Corporation, Defendants and Appellees

Civil No. 10,965

Appeal from the District Court, McKenzie County, Northwest Judicial District, the Honorable William M. Beede, Judge.

AFFIRMED.

Opinion of the Court by Gierke, Justice.

Gordon Dihle (argued), of Gordon Dihle and Associates, P.O. Box 1944, Williston, for plaintiff and appellant.

Roland A. Suess [argued], and John A. Suess [appearance], of Suess Law Firm, P.O. Box 1651, Williston, for defendant and appellee Tim Dwyer.

Mackoff, Kellogg, Kirby & Kloster, P.O. Box 1097, Dickinson, for defendants and appellees Exeter Exploration Company and Inter-American Petroleum Corporation.

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Monson v. Dwyer

Civil No. 10,965

Gierke, Justice.

Harvey Monson appeals from a judgment of the District Court of McKenzie County. This is an action to determine the rights of Harvey Monson, Roy Monson, and Tim Dwyer to certain oil, gas, and mineral rights. We affirm.

On January 23, 1959, Roy Monson [Roy] received a deed from the Federal Land Bank granting some 360 acres. By this deed the Federal Land Bank reserved, for a period of twenty-five years, beginning on November 29, 1944, a fifty percent mineral interest. On April 1, 1959, Roy executed a warranty deed conveying to Tim Dwyer [Dwyer] the 360 acres acquired by Roy from the Federal Land Bank.

The Monson-Dwyer deed described the property as follows:

"The East Half of the Southwest Quarter (E/2SW/4), the Southwest Quarter of

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the Southwest Quarter (SW/4SW/4) of Section Twenty-six (26); the Southeast Quarter of the Southeast Quarter (SE/4SE/4) of Section Twentyseven; the Northeast Quarter of the Northwest Quarter (NE/4NW/4), the North Half of the Northeast Quarter (N/2NE/4) of Section Thirty-four (34); the North Half of the Northwest Quarter (N/2NW/4) of Section Thirty-five (35), all in Township One Hundred Fifty-one (151) North, Range One Hundred One (101) West of the Fifth Principal Meridian; subject to all reservations of record; and EXCEPTING AND RESERVING unto the party of the first part, his heirs, successors or assigns twentyfive (25%) per cent of all right, title and interest in and to any and all oil, gas, uranium, clay, gravel and other minerals in or under the foregoing described lands, with such easement for ingress, egress and use of the surface as may be incidental or necessary for the use of said rights: AND

"[T]he Northwest Quarter of the Southwest Quarter (NW/4SW/4) of Section Twenty-six (26); the South Half of the Northeast Quarter (S/2NE/4), the Northwest Quarter of the Northeast Quarter (NW/4NE/4), the Northeast Quarter of the Northwest Quarter (NE/4NW/4), the North Half of the Southeast Quarter (N/2SE/4) of Section Twenty-seven (27), in Township One Hundred Fifty-one (151), Range One Hundred One (101) West of the Fifth Principal Meridian, subject to all reservations and exceptions of record."

In the above description, the first paragraph is the land which Roy received from the Federal Land Bank and which was the property covered by the Federal Land Bank reservation. The land in the second paragraph is land in which all minerals had previously been reserved, and Roy did not own any minerals.

On June 3, 1982, Roy executed a mineral deed to Harvey Monson which purported to quitclaim, "... only that portion which was reserved and disclaimed by the Federal Land Bank" The Monson-Monson deed further stated that Roy was to retain his twenty-five percent interest. Dwyer, in 1972 and again in 1977, had executed oil and gas leases on the acreage released by the Federal Land Bank with no claim made by Roy.

At trial Roy alleged that the Monson-Dwyer deed was to convey only twenty-five percent (25%) of the minerals and that Roy was to retain twenty-five percent (25%) of the minerals and all rights in the Federal Land Bank interest which had expired in November 1969. The trial court found for Dwyer, finding the present mineral ownership to be: Roy Monson,(25%); Tim Dwyer, seventy-five percent (75%); none.

The primary issue on appeal is whether or not the words "subject to" were intended to reserve the Federal Land Bank's interest in Roy. Recently we have determined that the clearly erroneous standard of Rule 52 (a) of the North Dakota Rules of Civil Procedure applies to findings based on undisputed or documentary evidence. Stracka v. Peterson, 377 N.W.2d 580, 582 (N.D.1985). This application of the clearly erroneous standard is a departure from our previous treatment of findings such as the instant case presents. After applying this standard of review we conclude the trial court was not clearly erroneous.

We have stated that the words "subject to" are generally terms of qualification meaning "subordinate to", "subservient to", "limited by" or "charged with". Stracka, supra. These words connote a limitation on a grantor's warranty and not a reservation of rights. Stracka, supra.

This interpretation of the words "subject to" is the generally accepted view and is properly adhered to by the trial court in the instant case. We conclude that the words "subject to" in the Monson-Dwyer deed do not act as words of reservation.

Harvey Monson further contends that if the words "subject to" do not act as words of reservation, the trial court erred in failing to find that the Monson-Dwyer

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deed is ambiguous. Harvey Monson correctly asserts that an ambiguity exists when good arguments can be made for either of several contrary positions as to the meaning of a term. West v. Alpar Resources, Inc., 298 N.W.2d 484, 490 (N.D.1980). He alleges that the contradictory positions as to the interpretation of the words "subject to" are that it meant either a limitation of warranty and the grantee took subject to that limitation, or that the words "subject to" totally removed the land from the warranty and excepted the reserved mineral interest. He then argues that the latter interpretation is supported by the fact that the words "subject to" are used on two portions of the deed, the portion which includes mineral rights and a portion of the deed under which Roy had no mineral interest. He asserts that since the language appeared in both portions of the deed, including the portion under which Roy had no mineral interest and the disputed portion, it was obviously meant to except the prior reservation from the warranty. We cannot agree. When the proper definition of the words "subject to" is applied, it is apparent that the words are used to protect the grantor, specifically placing a limitation on the grantor's warranty.

Harvey Monson directs this court to Bulger v. McCourt, 138 N.W.2d 18 (Neb.1965) to support the contention that the words "subject to" constitute a valid reservation. He argues that the Bulger decision reinforces the argument that there is an ambiguity which automatically arises when the words "subject to" are used in a deed. The Nebraska court ruled the expression "subject to" is a term of qualification which acquires its meaning from the context in which it appears. Bulger, supra, 22. The context in which this expression was used in Bulger is the very reason it is distinguishable from the instant case. In Bulger there was no prior reservation of a mineral interest to which the expression "subject to" could refer and, consequently, the court concluded that the phrase must necessarily express an intent to reserve the mineral interest. Stracka, supra, citing Bulger v. McCourt, 138 N.W.2d 18 (Neb.1965).

Harvey Monson also asserts that § 47-09-13 of the North Dakota Century Code requires that the deed be interpreted in favor of the grantor. As in Stracka, the issue here is whether or not a reservation exists and not the interpretation of a valid reservation.

We affirm the decision of the trial court. The present ownership of the disputed mineral rights is: Roy Monson, twentyfive percent (25%); Tim Dwyer, seventy-five percent (75%); and Harvey Monson, none.

H.F. Gierke III
Ralph J. Erickstad, C.J.
Gerald W. VandeWalle
Beryl J. Levine
Herbert L. Meschke